

SEVENTY-SIXTH SESSION

***In re* CASSEGNEY**

Judgment 1336

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Yvette Cassegney against the International Office of Epizootics (OIE) on 29 March 1993, the OIE's reply of 25 May, the complainant's rejoinder of 5 July and the Office's surrejoinder of 2 August 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, and Articles 40.6, 40.14 and 80.1 of the OIE Staff Rules;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a French citizen who was born in 1952, joined the OIE on 15 February 1990 on a three year fixed-term appointment under Article 40.6 of the Staff Rules. At the material time she held a post as accountant at grade 2, scale 6 in category III in the Administration and Finance Department.

In accordance with the OIE's rules on performance appraisal, on 21 December 1990 the head of Administration and Finance, her supervisor, wrote a report on her work observing that, though taking over some complex accounts part way through the year had not be easy, she had kept the OIE's accounts satisfactorily. There were no further written assessments of her performance.

Towards the end of 1992 and in early 1993 mistakes were found in her work and she was handed back the papers with corrections and observations by colleagues.

In a letter of 3 February 1993 the Director General offered her a one-year extension of appointment from 15 February 1993 to 14 February 1994. She was to return a copy of the letter with her written acceptance by 8 February, but she left work on 10 February without having done so. In the meantime she had had an interview with the Director General on 5 February. She was absent until 22 February, first on sick leave from 11 to 17 February and then on a week's leave granted previously that partly coincided with the sick leave. The letter of 3 February 1993 is the first decision she impugns.

In a letter of 12 February she told the Director General that: (1) she agreed to the idea of renewal of her contract; (2) she was surprised that the offer of renewal was for one year and not three at least; (3) in her three years with the OIE she had never been told of any serious misconduct which might warrant her being offered a shorter appointment. She also claimed compensation equivalent to one year's salary at least for the injury caused by the loss of her job.

On 15 February the Administration sent her a pay slip and a cheque for the sums due to her.

In a letter of 18 February to the Director General, which reached the OIE on the 24th she repeated what she had said in her letter of 12 February and informed him that she would return to work on 22 February. She also asked why the pay slip of 15 February was for amounts due upon termination of contract.

She turned up at the OIE on 22 and 23 February 1993 but was not allowed to work. In a letter dated the 22nd the Director General told her that he had terminated her appointment at 14 February because she had failed to accept by 8 February his offer of 3 February. He confirmed that decision in a letter of 23 February. The letter of 22 February is the second decision she challenges.

In response to that decision she went to the President of the Administrative Commission which audits the OIE's accounts and oversees administration and which was holding its annual meeting in Paris from 22 to 26 February 1993. The President saw the Director General on her behalf and thereafter the Director General offered her a three-month renewal of appointment on the condition that she signed a statement saying that she had refused the original one-year extension. She turned down that new offer.

B. The complainant has three pleas.

First, she submits that the OIE failed to give her reasonable notice of termination. There were only eleven days between the decision of 3 February 1993 and the expiry of her appointment - 14 February - and that was too short a time for her to look for a stable job. Notice was the more important in her case as she had no entitlement to unemployment benefit. Although Article 40.6(b) of the Staff Rules does not require the Administration to give notice of non-renewal of fixed-term appointments all recent contracts granted by the OIE prescribe six months' notice.

Secondly, the decision of 3 February 1993 was unwarranted and arbitrary and showed abuse of authority. The offer of renewal for only one year was contrary to the OIE's usual practice of renewing fixed-term appointments for the same amount of time as the initial appointment. Furthermore, by providing that "a fixed-term appointment shall be an appointment for a continuous period of not less than one year and generally of three years" Article 40.6(a) of the Staff Rules clearly meant three years to be the norm. By failing to observe it the OIE discriminated against her. The absence of any reason for the decision of 3 February 1993 was further evidence of how arbitrary it was. She points out that during her three years of service she received no criticism or sanction.

Thirdly, she submits that the OIE wrongfully terminated the one-year appointment which it offered her on 3 February 1993 and which she accepted, in particular in her letter of 12 February. It did so to prevent her from informing the Administrative Commission of the dispute over the length of the renewal it was offering. The administration wilfully distorted what she said in her letters of 12 and 18 February so as to infer rejection of its offer and terminate her appointment.

The letter of 22 February 1993 shows that the procedure used to terminate the one-year appointment was spurious. The Director General gave as the reason for his decision her failure to reply to his offer of 3 February in time, by 8 February. But that deadline gave her only four clear days, and neither the Staff Rules and Regulations nor her contract prescribe any such time limit. Besides, the letter of 3 February did not make it plain that the time limit was binding.

Because the OIE acted improperly, she found herself suddenly without a job.

She asks the Tribunal to order the OIE to pay her the equivalent of one year's salary (218,140.20 French francs) in damages and award her 35,000 francs in costs.

C. In its reply the OIE challenges the complainant's version of the facts and alleges that her work grew steadily worse. It observes she had only herself to blame for lack of unemployment insurance.

It submits that her pleas are devoid of merit.

First, citing Article 40.6(b) of the Staff Rules, it says it has no duty under those Rules to give notice of non-renewal of fixed-term appointments. Nor does any general principle of law lay such duty on it. Besides, the letter of 3 February 1993 told the complainant, not of non-renewal, but of a one-year extension.

Secondly, the OIE's practice regarding the extension of fixed-term appointments - even supposing there was such practice - conferred no rights on the complainant. Since length of appointment is determined by its own interests, its offer of renewal for one year and not three was warranted: she had made mistakes in the accounts, and though it feared she might do so again, it was willing to give her one last chance.

Thirdly, the OIE submits that the one-year contract which she says it "wrongfully terminated" never existed. She failed to accept in time the Director General's offer of 3 February 1993. Besides, it was plain from her behaviour that she no longer wanted to work for the OIE. When she saw the Director General on 5 February she did not formally and unreservedly accept his offer of renewal. On 10 February she announced that she was leaving for good and on the same day asked for and got a statement of her overtime, returned the keys to the safe which were

in her keeping and took away all her personal belongings. Her claim to compensation confirms that she rejected the offer of 3 February 1993. Lastly, in her letter of 18 February, posted on the 23rd, she still spoke of accepting the "idea of renewal"; not until 22 February did she inform the Director General that she accepted the renewal of her appointment for one year.

D. In her rejoinder the complainant enlarges on her three pleas.

She contends that the OIE did have a duty to give her notice because her letter of appointment prescribes three months' notice in the event of termination or non-renewal or of resignation.

The facts show that the decision of 3 February 1993 was not taken in the OIE's interests. Her report for 1990 spoke highly of her but it was the last one she got. Thereafter she was given no hint of what her supervisors thought of her; so could make no comments in answer. Consequently the absence of any assessment of her work in 1991 and 1992 may not be taken as criticism of it. The number of mistakes she made was no higher than the average and anyway some of them were the Administration's. The Director General gave her a salary increment on 1 December 1992, before it was due, and according to Article 40.14 of the Staff Rules "a salary increment may be granted earlier if the services of the staff member are highly appreciated".

Lastly, the one-year appointment did exist: she accepted it. The OIE is mistaken in saying that she rejected it orally or by implication. The reason why she gave back the keys on 10 February was that she knew she would be absent until 22 February and should complete her accounts beforehand so as not to cause her employer any inconvenience. She had not "taken away all her personal belongings" on 10 February 1993. There was no reason to take her absence from 11 to 19 February to mean that she had left for good: she was absent on sick leave and then on leave which she had planned well before those dates. The compensation she claimed in her letter of 12 February was for the loss not of her job but of job security and was to cover the material and moral injury she subsequently sustained. Her claim is not therefore inconsistent with her acceptance of the "one-year renewal" of her appointment.

E. In its surrejoinder the OIE maintains that there was never the one-year contract which the complainant says it wrongfully terminated. Her making the acceptance subject to a claim to compensation equal to the salary that would be due in the event of a one-year extension of her appointment meant that she wanted to leave for good.

The OIE fails to see why renewal of appointment for a specified period should require legal protection in the form of notice.

As for her contention that the decision of 3 February 1993 was arbitrary, the appraisal of her performance is irrelevant to the matter of the offer of 3 February 1993 to extend her appointment. The first report on her work is not very good, and the early award of salary increments is common before the Christmas and New Year holidays.

CONSIDERATIONS:

1. The International Office of Epizootics (OIE) recruited the complainant on 9 January 1990 to serve as an accountant under a fixed-term contract for three years from 15 February 1990 to 14 February 1993.
2. On 3 February 1993 the Director General made her an offer to extend her appointment by one year to 14 February 1994 and gave her until 8 February 1993 to accept. In a letter of 12 February 1993, which reached the Director General's office on the 16th she said she "agreed to the idea of renewal" but was dismayed at being offered only one year.
3. On 15 February she was sent a pay slip and a cheque for "final settlement upon expiry of fixed-term appointment". In a letter of 18 February, posted on the 23rd and received at the Office on the 24th, she confirmed the acceptance in her letter of 12 February of the "idea of renewal" and said she intended to go back to work on the 22nd. But in reply to her letter of 12 February the Director General informed her in a letter of the 22nd that since she had failed to accept by the 8th his offer of the 3rd her appointment had expired on the 14th.
4. As soon as she got his reply she sent the Director General a fax letter also dated 22 February pointing out that as early as the 12th she had agreed to the idea of renewal and so took the view that her appointment had been extended by one year. The following day, the 23rd, the Director General confirmed what he had told her in the letter of 22 February. But on the 26th he said he would, if she wished, offer her a three-month appointment. She

refused. She is impugning the decisions of 3 and 22 February 1993 and claims damages.

5. A decision to renew or extend a fixed-term contract without notice or compensation is a discretionary one, though the discretion must be exercised in the Organisation's interest. The Tribunal will review the decision and will set it aside if it was taken without authority or in breach of a formal or procedural rule, or was based on a mistake of fact or of law, or overlooked some essential fact, or drew mistaken conclusions from the factual evidence, or constituted abuse of authority.

6. The complainant has three main pleas: absence of reasonable notice, the arbitrariness of the decision of 3 February 1993, and wrongful termination of the one-year contract.

7. She first objects that the Office told her only eleven days before expiry that her appointment would be extended, not by three years but by one. She was, she says, entitled to reasonable notice so that she could look for another job.

8. The plea fails. Article 40.6(a) of the Staff Rules says that fixed-term appointments end on the date specified in the letter of appointment. According to paragraph (b) they "may be extended or renewed" at the Director General's discretion but confer no right to extension or renewal. Paragraph (b) stipulates in fine that a fixed-term appointment "shall, unless extended or renewed, expire according to its terms, without notice or indemnity". Article 80.1 goes even further:

"A ... fixed-term appointment shall expire automatically and without notice or indemnity on the expiration date specified in the letter of appointment provided for in Article 40.3 of these Rules."

9. The decision of 3 February 1993 offered to extend her fixed-term appointment by one year. If, as she maintains, the purpose of notice is to let staff members whose appointments are being terminated seek alternative employment the Administration had no reason to give her notice since she was getting a year's extension and staying on after the expiry of her current contract. The requirement of her consent changed not a whit the Office's intention of keeping her on: whether or not she accepted was entirely up to her. Nor does she offer any proper evidence in support of her contention that recent appointments provide for six months' notice.

10. Her second plea is that the decision to "renew" her appointment for only a year was in breach of an alleged practice of the Office of renewing fixed-term appointments for periods equal in length to that of the original appointment. She says that giving her only one year constituted "exceptional, non-standard" treatment and was arbitrary, not in the interests of the Office and tainted with misuse of authority.

11. As the Office points out, the decision was not to renew but to extend her appointment. Article 40.6(b), cited above, expressly allows that. Renewal is ordinarily granted for the same period as the preceding appointment inasmuch as it reproduces the same terms and they include duration. But extension is usually shorter. So the decision to extend the complainant's contract by one year was in keeping with 40.6(b).

12. The complainant further charges the Office with acting arbitrarily. She alleges that the decision to extend her appointment by a "non-standard" period of one year fails to explain why she was so discriminated against, and in her submission the Director General was mistaken in referring on 22 February 1993 to "the reasons I gave you when we met on 5 February". She contends, as she said in her letter of 12 February, that she always carried out her duties "conscientiously, competently and discreetly"; that her performance appraisal at the end of her first year was "outstanding"; and that even though she had not got an appraisal after her second year she had "never incurred serious criticism warranting a shorter appointment".

13. The Office retorts that when they met on 5 February the Director General gave her confirmation of the reasons for the extension and told her that while on extended appointment she would get written notice of any mistakes she might make. The Office denies that her performance was beyond reproach. Though it was satisfactory up to 21 December 1990 it then went into such decline that her supervisor decided against writing an appraisal of her in 1991 because she was often ill and had suffered a harrowing bereavement. The Office cites shortcomings in her performance which led her supervisor to tell her in January 1993 that her output was too low for the end of the accounting period and her work riddled with mistakes. That is why in the interests of the Office the Director General offered her an extension of just one year.

14. The evidence being in conflict, the Tribunal will take into account all the circumstances of the case so as to

determine whether the impugned decision shows any of the fatal flaws, and it is satisfied on the evidence that although the appraisal she got for her first year was good she later incurred the criticisms mentioned above. So the Director General was free, in judging her suitability and in determining the interests of the Office, to take the view that some features of her performance warranted extending her appointment by only one year, the purpose being - says the Office - to give her a chance to improve or else find another job. The decision was not arbitrary.

15. Her last plea is wrongful breach of a one-year appointment she says she got. She submits that she did accept the offer of extension in the impugned decision of 3 February 1993 when on 5 February she gave oral acceptance of the "idea of renewal" and then written acceptance in her letter of the 12th. She infers the existence of a valid one-year appointment.

16. The Tribunal observes first that all she accepted was the "idea of renewal". That phrase and the protest that accompanied it do not allow of the interpretation that she was conveying unqualified acceptance of the Director General's offer.

17. In any event the Office gives a different version of the facts. It says that on 5 February 1993 she failed to accept an offer the Director General himself made her to work "under supervision". On 10 February, it maintains, she actually said she could not accept a one-year extension.

18. The Tribunal observes that in the letter of 3 February the Director General told her "I would appreciate your returning a copy of this offer indicating your acceptance by 8 February". Instead of signing and returning it by that date she waited until the 12th to send the Director General a letter - which he says he did not get until the 16th - accepting only the "idea of renewal" of her appointment, without saying anything about the length of it or any other matter. The Office was therefore entitled to infer that she had not accepted the offer of extension it had made on the 3rd.

19. She says she is surprised at the Director General's waiting until 22 February to tell her in answer to her letter of the 12th that he had withdrawn the offer. As early as the 15th, the Office observes, the Administration had sent her a pay slip "in final settlement upon expiry of fixed-term appointment". It argues that though her letter of the 18th reconfirmed the one dated the 12th the Director General did not receive it until the 24th and that her having reported for work on the 22nd prompted it to make its position plain to her in its letter, also of the 22nd, in reply to her letter of the 12th (since the letter of the 18th had not yet arrived).

20. The conclusion is that her failure to accept its offer by the deadline it had set had the effect of cancelling its offer and that no contract was concluded. So her plea of wrongful termination of such contract plainly will not square with the facts and must, like the others, fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda
E. Razafindralambo
Michel Gentot
A.B. Gardner